powered to reject a plan of any new building if such plan is not in conformity with the approved plan [section 145(i)].

Mr. Marjoribanks argued that since the road improvement line in lay-out plan L722 has not as yet been gazetted, the commissioner had not therefore the power to refuse planning permission. I do not see the validity of this argument. Even before a draft lay-out plan is approved by the Ruler in Council, the commissioner, I think, is equipped with the power to control erection of buildings on land covered by a lay-out plan, that is to say, he is empowered to refuse approval of a plan for any new building to be erected upon any land in respect of which the preparation of a lay-out plan has been made. Section 145(ii) of the Town Boards Enactment seems to be relevant to the present case.

Section 145(ii) reads as follows —

"The Board may refuse to approve the plan of any new building or of any private street to be erected or made upon any land in respect of which the preparation of a draft plan or lay-out has been authorised by the Board."

For these reasons, I think the commissioner had rightly exercised the powers given under sub-section (ii) of section 145 of the Town Boards Enactment when he refused the building permission of an additional two-storey shophouse as it did not comply with lay-out plan L722. He had not in any way acted *ultra vires* his powers.

In view of my finding, I do not propose to deal with the question of estoppel.

I would therefore dismiss this application with costs.

Application dismissed.

Solicitors: *Lovelace & Hastings; Shook Lin & Bok.*

AMPANG ESTATE LTD. v. GUAN SOON TIN MINING CO.

[O.C.J. (Abdul Hamid J.) January 7, 1972]

[Kuala Lumpur — Civil Suit No. 742 of 1968]

Land Laws — Right of support — Land in its natural state by adjacent land — National Land Code, ss. 44(1)(b), 282 & 291.

Mining — Right of support — Operations on adjacent land — Duty of care — Presence of superimposed structure — Effect of — Whether land 'in its natural state' — Mining Enactment (Cap. 147) ss. 11(v), 16(vi), 61, 65 and 134.

Damages — Mining operations — Damage to adjacent property — Quantum.

The plaintiffs are a housing development company and the defendants are miners operating a tin mine adjacent to the plaintiffs' estate. The plaintiffs claimed for damages to their land in the sum of $103,669.25.

It was alleged that the defendant firm, carrying on mining operations, worked the mine and had extracted minerals within and under its land causing thereby the withdrawal of support to the plaintiffs' land, in consequence of which the plaintiffs' land was damaged. It was also alleged that the defendant firm continued and threatened to continue the said workings in such a manner as would inevitably cause further damage to the plaintiffs' land.

On March 2, 1967, a prohibition order was served on the defendants by the mines department requiring them to cease mining operations in the area adjacent to the plaintiffs' land.

The plaintiffs contended that the defendants right to work the said mine as conferred by the mining title under the Mining Enactment (Cap. 147), was subject to the conditions that the defendant firm, its partners, servants or agents should pay compensation for all damages as might be caused by reason of such workings, to the owners and occupiers of the surface thereover or adjacent thereto.

The defendants contended that the plaintiffs were not entitled to any right of support and that they had at no time acquired such right.

The question that arose for determination was whether the defendants, as owners of land adjoining that of the plaintiffs' and upon which the defendants were licensed to carry out mining operations, were under a legal obligation to support the plaintiffs' land and if they were, whether the presence of a concrete drain on the plaintiffs' land disentitled the plaintiffs to this right of support. Therefore, it was necessary to determine whether the plaintiffs' land fell within the category of land in its natural state within the meaning of section 44(1)(b) of the National Land Code

Held: (1) on the facts available, it was clearly established that the defendants not only carried out mining operations on their land adjacent to the plaintiffs' land before the slip occured, but continued to do so despite the prohibition order issued by the mines department. The subsidence was solely, caused by the mining operations carried out by the defendants resulting thereby in the withdrawal of support of the plaintiffs' land;

(2) at common law, the right to support of land is one of the ordinary and inseparable incidence of ownership though its exercise requires an adjacent owner to forebear from doing something on his land that otherwise he would be free to do. The owner of land *ex jure naturae* has a right only to so much support to his neighbour's land as will support his own land unencumbered by buildings;

(3) the issue of a licence to mine is merely to confer on the licensee only such right to win specified mineral from the land. The licensee must, however, remain subject to the adjoining owner's statutory right to support. The Mining Enactment made it abundantly clear that a person granted a licence to mine, is not relieved from liability in respect of damage caused to a person's property;

(4) there was no evidence to warrant a finding that the superimposed structure, namely the concrete drain, caused the land to subside. The subsidence that resulted in the withdrawal of support of the plaintiffs' land was solely caused by the wrongful acts of the defendants, and in no way was caused by or contributed to by the presence of the drain;

(5) therefore, the defendants were liable for the damage caused to the plaintiffs' land.

Cases referred to:-

(1) *Backhouse* v. *Bonomi* 4 L.T. 754 at p. 755.

(2) *Dalton* v. *Angus* L.R. 6 App. Cas. 740; [1881-5] All E.R. Rep. 1.

(3) *Geddis* v. *Proprietors of Bann Reservoir* (1878) L.R. 3 App. Cas. 430.

(4) *Guan Soon Tin Mining Co.* v. *Wong Fook Kum* [1969] 1 M.L.J. 99.

(5) *Brown* v. *Robins* 157 E.R. 809.

(6) *Stroyan* v. *Knowels; Hamer* v. *Knowels* 158 E.R. 186.

(7) *Bonham-Carter* v. *Hyde Park Hotel* 64 T.L.R. 177 at p. 178.

CIVIL ACTION.

S. D. K. Peddie for the plaintiffs.

Edgar Joseph Jr. for the defendants.

Cur. Adv. Vult.

Abdul Hamid J.: This is a claim by Ampang Estate Limited, a company incorporated in the States of Malaya against Guan Soon Tin Mine Company for damages to its lands.

It is alleged that the defendant firm its partners, servants or agents are carrying on mining operations at a mine known as Guan Soon Tin Mine in lands adjacent to the plaintiffs' land and that on or about and from September, 1966 to the date of filing the claim (21st May, 1968) the defendants worked the mine and gotten minerals within and under its land causing thereby the withdrawal of support to the plaintiffs' land in consequence of which the plaintiffs' land was damaged.

The plaintiffs claim a sum of $103,669.25 for expenses incurred for the period from 1st January, 1967 to 11th February, 1971.

It is also alleged that the defendant firm continued and threatened to continue the said workings in such a manner as will inevitably cause further damage to the plaintiffs' land. The plaintiffs contend that the defendants' right to work the said mine as conferred by the mining title under the Mining Enactment (Cap. 147) is subject to the conditions that the defendant firm its partners, servants or agents should pay compensation for all damages as might be caused by reason of such workings to the owners and occupiers of the surface thereover or adjacent thereto.

The plaintiffs further contend that the defendant firm its partners, servants or agents have committed the damage and injury alleged in exercise of that right.

The defendants deny they did any of the wrongful acts alleged by the plaintiffs and aver that the mining operations carried on by them at their mine did not at any time interfere with the plaintiffs' right of support.

The defendants contend that the plaintiffs are not entitled to any right of support and that they had at no time acquired such right.

Alternatively the defendants contend that the alleged damage was solely caused or substantially contributed to by the negligence of the plaintiffs their servants or agents —

(a) for failing to construct any or any adequate system on their land which was adequate especially for heavy rains;

(b) for failing to take any other step to ensure that the alleged damage complained of did not occur; and

(c) for allowing the alleged damage complained of to occur.

It is averred that by reason of the plaintiffs' negligence and on account of heavy rains occurring at the material time, the land north of the defendants' mine became water-logged. The presence of the water ahead of the mine face inevitably increased the level of the water table thereat causing increased seepage at the mine face. It is further averred that such seepage sufficiently damaged the mine face causing it to slip especially immediately after heavy rainfall. It is argued that if such slip occurs and damages a drain, the water carried by such drain would flow on to the slipped surface causing further damage.

In the further alternative the defendants contend that the acts complained of are acts authorised to be done by them under the provisions of the Mining Enactment. The defendants say that they are and were at all material times carrying out and they intend to carry out their statutory powers and duties under the said Enactment in a reasonable and proper manner and with due care and skill and if any injury or damage has been or is or will be caused to the plaintiffs by the defendants such injury or damage could not have been and cannot now or in future be avoided by the exercise of reasonable care on the part of the defendants and that the plaintiffs have no cause of action in respect of the same.

Briefly the facts are as follows —

The plaintiffs are the owners of Ampang Estate a housing development along Ampang Road near Ampang Road/Ulu Klang Road junction. The defendants were at the material time operating a tin mine on mining certificate 1441 for Lots 3984 and 59 under hydraulic licence No. 119/68 adjacent to Ampang Estate in the south. (See P12). As part of the development, the plaintiffs constructed a big drain which is the main outlet for the whole scheme along the southern boundary. On 4th October, 1966, the plaintiffs wrote to the Senior Inspector of Mines South Zone informing that there were mines operating at the adjacent land and they discovered a hole made near the company's drains. Water was flowing from this hole to the company's drains. The Senior Inspector of Mines investigated and found that the water that entered the drain came from a low-lying swampy area and the flow was due to natural drainage trend. He further found that the effluent from defendants' mine was also discharging into this swamp.

Another complaint of damage was made by Mah & Kok, advocates and solicitors acting on behalf of the plaintiffs on 13th February, 1967 (P3). The Mines Department replied stating that the damage was caused by a slip of ground on the mine face which had been left unworked for some time (see P4), and was brought about by wet weather. The slip went about 15 feet into the plaintiffs' land. The letter also stated that prior to the slip a reserve of about half a chain was left between the boundary and edge of the mine hole.

The plaintiffs adduced evidence from one Tan Kim Bee (PW1) a senior inspector of mines who stated that there is a road reserve between the plaintiffs' land and the mine and that under the rule, the distance whereby one can carry out mining operations is not less than one chain. The miner in this case, he said, had broken rule 14(1)(c). Mr. Phun Kong Tee, an inspector of mines (PW2) produced a letter dated 29th December, 1966 (P7) from the defendant company

stating that a slip had occurred due to heavy rain causing a minor landslide. As a result of this, Enche Jaffar an inspector of mines, issued written instructions (P8) to the manager of Guan Soon Tin Mines directing that certain repair works be carried out and the manager was not to allow mining operations to commence prior to the completion of those works.

On 2nd March, 1967, a prohibition order (P9) was served on the manager requiring him to immediately cease all mining operations on the north and north-west phases of the mine hole situated on M.C. 1441 Lot 3184. PW2 also referred to the following minute by Enche Jaffar —

"A monitor was directed to the toe of the north phase contrary to previous instruction not to work the said phase."

He also referred to a minute dated 6th April, 1967 by Mr. Chew another inspector of mines which states that —

"Monitors were working in the mine floor of the mine hole but one monitor was used to cut the toe of north-west phase. A *kepala* was found who was instructed to stop cutting the said toe."

On 17th May, 1967, another prohibition order was issued to the mine manager prohibiting mining on all phases of the mine (P10).

Mr. Peddie counsel for the plaintiffs submitted that the damage to the plaintiffs' land by reason of the slips which occurred from time to time along the southern boundary was caused by the acts of the defendants in working the mine too close to the common boundary and/or by their failure to maintain a sufficient degree of slope at the phase of their workings and/or by their having introduced into the plaintiffs' drainage system surface water and effluent from the mine workings.

I do not think I should concern myself with the allegation of the defendants' failure to maintain slope at the phase of their workings or their having introduced into the plaintiffs' drainage system surface water and effluent from the mine workings since these are not pleaded by the plaintiffs. I shall, however, determine whether the subsidence was caused by the mining operations carried out by the defendants and whether it was the result of such acts that resulted in the withdrawal of support of the plaintiffs' land.

There is, I think, abundance of evidence to show that at the time the slip occurred, the defendants were carrying out mining operations on their land. It is suggested by the defendants that the slip could have been caused by some extraneous agency such as the operation of water which accumulated on the plaintiffs' land ahead of the mine hole for which the defendants were not responsible. They seem to rely on the contents of D2, a letter sent by Enche Redzuan bin Sumun (DW2) a senior inspector of mines in reply to the defendants' solicitors' letter which reads —

"The presence of water-logged ground ahead of the mine face would inevitably increase the level of the water table thereat causing increased seepage at the mine face. Such seepage may sufficiently damage the mine face to cause it to slip especially immediately after a heavy rain. If such slip occurs and damages a drain, immediately ahead of the face, as has happened, the water carried by such drain would flow on to the slipped face causing further damage."

It is also suggested that the slip was brought about by wet weather (see P4). The defendants called one Chan Cheun Wah (DW1) who stated that he saw a pool of water next to the newly constructed road on the plaintiffs' land — 3 or 4 times after the rain.

There is of course the evidence of Enche Redzuan bin Sumun (DW2) who said he saw a pool of water on the plaintiffs' land about the size of the court room in a depression but under cross-examination, DW2 said he could not remember exactly when he saw this. He admitted that he did not make any inspection in December, 1966. He wrote D2 after he visited the defendants' mine and the plaintiffs' land on 24th January, 1967 — 3 to 4 weeks after the slip had occurred. It was only then that he noticed the water-log on the plaintiffs' land. According to DW2, the first slip was due to the existence of a mine hole and water on the ground beyond the mine hole. He also said that there would not have been a slip if the miner had not worked in that area and if the mine hole had not been there. Under cross-examination, DW2 went on to say that there would not have been a slip if the ground was dry.

In my opinion, there is no evidence to support DW2's conclusion that the slip was caused by the presence of water on the plaintiffs' land. He did not explain how he came to the conclusion that water ahead of the mine hole might have caused increased seepage at the mine face. Indeed there is no evidence whatever to show that there was water there on the day when the land subsided.

On the evidence before me, I cannot, on the balance of probabilities, hold that the slip was caused by the presence of water on the plaintiffs' land. Even assuming the water had in fact accumulated on the plaintiffs' land, the defendants have not, I think, sufficiently established to my satisfaction that this had caused the slip, particularly in the light of DW2's evidence that the only water he saw on 24th January, 1967 was approximately 60 to 100 feet away from the slipped surface.

As for the defendants' contention that the damage was solely caused or substantially contributed to by the negligence of the plaintiffs for failing to construct any or any adequate drainage system on their land which was adequate especially for heavy rains, I am not satisfied that there is any evidence to support this. On the contrary, there is evidence to show that drains sufficient to meet the requirement of the municipality were constructed on the plaintiffs' land.

The defendants also contended that the plaintiffs were negligent for failing to take any other step to ensure, and in fact have allowed, the alleged damage complained of to occur. However, they have not given any particulars of alleged negligence and indeed they have not adduced any evidence to support this contention. On the contrary, there is evidence to show that the plaintiffs in fact took reasonable steps to check the flow of water into the mine hole by constructing a temporary earth drain connecting the two broken points. In any event, the plaintiffs could not, I think, be held responsible for the further damage caused, if any, by

the flow of water from the broken drain to the slipped surface having found that the original slip was brought about solely by the wrongful acts of the defendants.

On the facts available, it is, I think, clearly established that the defendants not only carried out mining operations on their land adjacent to the plaintiffs' land before the slip occurred, but they continued to do so despite the prohibition order issued by the Mines Department. I am satisfied that the subsidence was solely caused by the mining operations carried out by the defendants resulting thereby in the withdrawal of support of the plaintiffs' land.

Having reached that conclusion, the necessary question that arises is whether the plaintiffs acquired that right to support from the adjacent land. Before dealing with the law, I wish to make it absolutely clear that I shall not concern myself with the plaintiffs' allegation of breach by the defendants of the Mining Enactment or the terms of the licence. These allegations are not disclosed by the pleadings. I shall only confine myself to the only issue in this case, namely, whether the defendants, as owners of land adjoining that of the plaintiffs' and upon which the defendants were licensed to carry out mining operations, were under a legal obligation to support the plaintiffs' land, and, if they were, whether the presence of the drain on the plaintiffs' land disentitled the plaintiffs to this right of support.

Counsel for the plaintiffs submitted that the first point of law to be considered is the nature and extent of the right of support enjoyed by a landowner in this country. It is urged upon this court to apply the principles laid down in the English law in distinguishing the right of support of land with no buildings and for land on which buildings have been erected. In this country, the law regarding the right to support for land and buildings is to be found under section 282 to section 291 of the National Land Code. The right to support of land in its natural state by an adjacent land is conferred by section 44(1)(b) of the said Code. The relevant part of this section reads —

"44.(1) Subject to the provisions of this Act and of any other written law for the time being in force any person ... to whom ... land has been alienated, ... shall be entitled to —

(b) the right to the support of the land in its natural state by any adjacent land, and all other natural rights subsisting in respect thereof;"

The Code has not defined the words "in its natural state." It is submitted that the right to support of land in its natural state should be interpreted in the light of English decisions and that the plaintiffs land should be regarded as land in its natural state. The presence of a concrete drain on the plaintiffs' land should not be regarded as dealing with the land as to cause the loss of this right to support.

Counsel for the defendants conceded that the right to support of land in its natural state is derived from section 44(1)(b) of the National Land Code and that the circumstances in which an action may be brought for an infringement of that right are the same in relation to the corresponding right under the English common law.

Although the defendants have not specifically pleaded that the plaintiffs were disentitled to the right of support by reason of their having constructed a concrete drain, they do however, contend that the plaintiffs are not entitled to any right of support and had not at any material time acquired such right. Thus in the instant case, it is necessary to determine whether the plaintiffs' land falls *within* the category of land in its natural state.

I propose to examine very briefly, the nature and extent at common law of the right to support of land as distinguished from easements. Mr. Peddie referred to a passage in *Clerk & Lindsell* on Torts, 12th ed. paragraph 1253 which summarises the English law regarding this right of support. It reads —

"The owner of land has a right to the support of his land in its natural state from the adjacent and subjacent land of the neighbouring owners. This right is not an easement but a natural incident of his ownership. There is no natural right of support for buildings, but such a right may be acquired as an easement by grant, express or implied, or by prescription at common law or under the Prescription Act, 1832. An acquired right is similar in character to a natural right. If the adjacent or subjacent support is withdrawn so as to cause land to subside, and the subsidence has not been caused by the additional weight of the buildings or other erections upon the land, the landowner is entitled to recover, in addition to damages for the subsidence of his land, damages for the injury to his buildings or other erections although he has no acquired right of support in respect of them."

It is apparent that this right is one of the ordinary and inseparable incidence of ownership though its exercise requires an adjacent owner to forebear from doing something on his land that otherwise he would be free to do. The owner of land *ex jure naturae* it would seem has a right only to so much support of his neighbour's land as will support his own land unencumbered by buildings.

Mr. Peddie submitted that it is the intention of the draftsman that the Malaysian law and English law pertaining to the right to support of land in its natural state should be identical. In the absence of any definition of the words "in its natural state" under the Code, I am inclined to think that the draftsman had in mind the common law position and had intended that the nature and extent of the right should be the same as at common law. The nature of the right conferred under section 44(1)(b) should therefore be the same as what was described by Lord Wesleydale in *Backhouse* v. *Bonomi*[1] namely —

"... the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighbouring property not to interrupt that enjoyment."

In the case of *Dalton* v. *Angus*,[2] this right was described by Pollock B. at page 742 as follows —

"The right to lateral support of soil by adjoining soil is a natural right which exists wherever the lands of adjoining owners are in contact. The grounds upon which it is based are fully explained in the cases of *Humphries* v. *Brogden* 12 Q.B. 739 and *Rowbotham* v. *Wilson* 18 E.&B. 123; 120 E.R. 45."

In the same case Field J. characterised this right as rights of an owner of land "in its natural state" and at page 752 said —

"If neither he nor his neighbour have built on or dealt with their respective portions, and the latter are in their natural

state and condition, it is clear that each owner has as against the other a right to have his soil supported by the soil of his neighbour, whether adjacent or below, and any act done by one which destroys that support so that the land of the other falls is an actionable wrong, and that is so, although the act complained of is not done by him maliciously, but simply in the exercise of his own right to use his own property. Although, therefore, either of them may dig in his own soil as deep and as near to his own boundary or to the surface as he chooses, this right is subject to one limitation from the very first, *viz.*, that he cannot dig so deep and so near as to cause his neighbour's land to sink, unless he substitute some other sufficient support: *Wilde* v. *Minsterley* 2 Roll. Abr. 564, Trespass I; *Humphries* v. *Brogden* (*supra*); *Rowbotham* v. *Wilson* (*supra*)."

Fry J. in the course of his judgment in that case said at page 772 —

"There is no doubt on the authorities that, as the support of soil by soil is in fact a result of nature, so the right to such support is given by the law as *ex jure naturae*, and as a proprietary right. It arises in all its force the moment two adjoining pieces of land are held by different owners and has no connection with the user of the land: *Humphries* v. *Brogden* (*supra*); *Rowbotham* v. *Wilson* (*supra*)."

Although the defendants have not denied that the right to support of land in its natural state is the same in relation to the corresponding right under the English common law, they, however, contend that in the Malaysian law, mining activities occupy a special position which has no counterpart in the common law. Under the common law, the right to extract mineral is a natural incident of ownership of land and that this right is therefore subject to the ordinary common law restrictions on the use of land including liability for interference with support of adjacent land. Counsel went on to say that under the Malaysian law, there is no natural right to extract mineral. Mineral rights are expressly excluded by section 45 of the Code from the ambit of the ordinary law relating to land. Such rights, he said, only arises under the Malaysian law where they are specifically granted under the Enactment. It is contended that section 44(1)(b) is not overriding but "subject to the provisions of this Act and of any other written law for the time being in force" and this section is therefore not intended to detract from the rights granted under the Enactment.

It is true that in this country, the right to mine is secured by obtaining a licence issued in accordance with the provisions of a statute namely the Mining Enactment and the Rules made thereunder. By the same token, it is also true that the right to support of land in its natural state is conferred by certain statutory provisions, the relevant section being section 44 (1)(b) of the National Land Code and it is an incident of ownership. If, as it is suggested and as it would seem to be, that provision is subject to the provisions of the Act and of any other written law for the time being in force, then, to my mind, what must be done is to examine these other provisions to see if there is in fact any provision in the Act itself or in any other Enactment which expressly or impliedly relieves or exempts the owner of mining land from his obligation to support the adjoining owner's land. I am unable to find any express provisions in the Act itself or in the Mining Enactment and neither am I able to find any provision which impliedly relieves the miner of such obligation. Indeed I am unable to find any provision which could reasonably be construed as having the effect of depriving the owner of an adjoining land of his statutory right to support even though that adjacent land is licensed for mining. In my view, the issue of a licence to mine is merely to confer on the licensee only such right to win specified mineral from the land. The licensee must, however, remain subject to the adjoining owner's statutory right to support. He is not exempted from the liability for wrongs committed in the course of exercising that right to win minerals. On the contrary, the provisions of the Mining Enactment tend to show that the licensee continues to be under the obligation to support the adjoining owner's land. In particular I should like to refer to section 11(v) of the Mining Enactment (Cap. 147) which states that —

"Every mining certificate shall be issued at the risk of the applicant who shall be liable in respect of any damage caused by his mining operations, whether such damage is due to the loss, removal or disturbance of boundary marks or not."

The way I construe this provision is that it imposes a strict liability on the part of the licensee for any damage caused by his mining operations. Support for this proposition may be found under section 16(vi) of the Enactment which lays down a condition —

"That the lessee will carry on all his mining operations in a safe, orderly, skilful, efficient and workmanlike manner, and will not cause danger or damage to the owners or occupiers of other lands, and will observe and perform all Rules and orders made or given in pursuance of this Enactment or by virtue of any Rules made thereunder;"

Section 65 read with paragraph 3 of Schedule XIV also lends support to this proposition. A lessee is liable for damage to other land caused through use of water and it imposes obligation to repair. Section 61 read with Schedule XVIII seems to prohibit injury to be done to other land. Apart from these provisions, there is one other section which specifically states that —

"134. No title, licence or other authority issued under this Enactment shall exempt any person from liability in respect of any damage occasioned by such person to the property of the Government or of any person."

In my view, the Enactment makes it abundantly clear that a person granted with a licence to mine is not relieved from liability in respect of damage caused to a person's property. His right to mine should therefore be subject to the adjoining owner's statutory right to support.

It is also submitted by counsel for the defendants that where operations are carried on under the authority of the statute in the authorised manner, the operator cannot be held liable for damages that result in the absence of negligence. The learned counsel cited the case of *Geddis* v. *Proprietors of Bann Reservoir*[3] where Lord Blackburn at pages 455/456 said —

"... it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does not lie for doing that which the legislature has authorised, if it be done negligently."

The principle in *Geddis'* case *supra*, was applied by Ong Hock Thye F.J. (as he then was) in *Guan Soon*

Tin Mining Co. v. *Wong Fook Kum.*[4] In allowing the appeal against the decision of the trial court which found the miner negligent in causing pollution of a fish pond by discharging tailings from their adjacent mine into it, Ong Hock Thye F.J. said that the appellants were not only authorised, but expressly directed, in conformity with the Mining Enactment to discharge their tailings into the pond.

I do not for a moment question the correctness of that statement of law and indeed I am bound by that decision if the facts of this case were on all fours with the facts of that case. The principle of law enunciated in that case cannot, however, be applied here. In that case, the Mines Department which directed that tailings from the appellants' mine be deposited on an area which included the fish pond, had in law, a power to make a binding direction. There was no question of a violation of the miner's statutory right.

In the instant case, the Mines Department did not, I think, have the power to direct the defendants to carry out mining operations on their land regardless of any violation of the plaintiffs' right to support of their land. To say that the Mines Department has the power to make such direction would in effect be tantamount to saying that the department has the power to relieve the miner from his statutory obligation to support the adjoining land inconsistent with the right conferred upon an owner of land under section 44(1)(b) of the National Land Code. It would also be inconsistent with section 134 of the Mining Enactment.

The only remaining question that warrants my consideration is whether, notwithstanding the presence of the drain on the plaintiffs' land, such land could still be regarded as being in its natural state. Mr. Peddie urged the court to hold that in view of the existence of identical laws as to a land owner's right to support both in England and in Malaysia, the same principle should apply here.

A fundamental distinction between land built upon and land not built upon is drawn under the English law. Since the right to support in this country is conferred by statute, I think the provisions of the Act itself should be looked at to see whether any assistance could be derived from it. Although the word "land" is defined under the Enactment, there is no definition of the words "land in its natural state." In the light of the context of section 44, the definition of "land" does not seem to be relevant. The court should therefore construe the meaning to be assigned to these words. One of the cardinal principles of construction is to give effect to the intention of the legislature. Since the Act confers on the owner of land a right similar to that at common law, it is, I think, proper to consider the English case law in order to construe the meaning of these words. English authorities do show that the right to support for land *ex jure naturae* is natural and necessary "as long as the *status quo* of the land is maintained." [*Dalton's* case at page 791 *per* Lord Selborne L.C.]. Thus the question that arises is whether the mere presence of a concrete drain on the plaintiffs' land has altered the *status quo* of the land. A review of the English authorities discloses that the character of such land as land *ex jure naturae* is lost if something is built or artificially imposed upon such land with the result that the superimposed structure increases the weight to such a degree that the neighbouring land cannot be expected to support that increased weight unless acquired by grant or prescription.

This principle is illustrated in the case of *Brown* v. *Robins*[5] where Pollock C.B. at page 811/812 said —

"As to the right of support for the house *qua* house, if necessary to decide it, which it is not, I should be disposed to hold that the plaintiff was entitled to the support of the surrounding ground. But the moment the jury found that the subsidence of the land was not caused by the weight of the superincumbent buildings, the existence of the house became unimportant in considering the question of the defendant's liability. It is as if a mere model stood there, the weight of which bore so small a proportion to that of the soil as practically to add nothing to it."

In the instant case, although it is suggested that the defendants' mining land had not in fact afforded support of the plaintiffs' land in its natural state, there was however no substantial allegation that the presence of the concrete drain constituted a superincumbent structure sufficient to alter the character of the plaintiffs' land to a degree that such land could no longer be regarded as land in its natural state so as to relieve the defendants of their statutory obligation to support the adjoining land.

After carefully considering the facts before me, I do not find any evidence whatever to warrant a finding that the superimposed structure, namely, the drain, caused the land to subside. I am however satisfied that the subsidence that resulted in the withdrawal of support of the plaintiffs' land was solely caused by the wrongful acts of the defendants and in no way caused by or contributed to by the presence of the drain.

It is my considered judgment that the defendants are liable for the damage caused to the plaintiffs' land.

As regards damages, counsel for the plaintiffs submitted that the plaintiffs are entitled to damages representing losses of profit, expenses incurred and consequential losses. He cited *Brown* v. *Robins, supra,* to show that the landowner is entitled to recover in addition to damages for subsidence of his land, damages for injuries to buildings or other erections though he has not acquired right of support or in respect of them. It is also submitted that a landowner is entitled to recover the deterioration in value of the buildings and damages in respect of machinery broken, the increased expenses of keeping machinery in working order and the diminished profits of occupation. In support of this, counsel cited *Stroyan* v. *Knowels; Hamer* v. *Knowels.*[6]

Mr. Edgar Joseph submitted that the plaintiffs must prove strictly each of the separate heads of damages set out in the statement of claim. He argued that the plaintiffs must prove their damages. Counsel cited a passage from the judgment of Lord Goddard C.J. in *Bonham-Carter* v. *Hyde Park Hotel*[7] as follows —

"The plaintiffs must understand that if they bring action for damages it is for them to prove their damage. It is not enough to write down the particulars and so to speak throw

them at the head of the court saying 'this is what I have lost. I ask you to give me these damages.' They have to prove it."

I think it is settled law that the onus is on the plaintiffs to prove the special damages claimed. In the instant case, one of the things the plaintiffs must show is that as a result of the subsidence, they incurred certain expenses in the construction of new drains. Evidence to this effect may be gathered from Mr. Tan (PW8) an accountant and company secretary for Ampang Estate who told the court that he was responsible for recording expenses of the estate and for keeping of vouchers, receipts and bills relating to these expenses. He produced vouchers to support items listed under the particulars of damages except for quit rents and assessments. Another witness Loh Ah Moy (PW10) the director of Ampang Estate referred to the items listed as construction of drains and stated that the expenses given therein relate to the broken drains. She also stated that she repaired the boundary drains several times after every cave-in. In answer to a question put by Mr. Edgar Joseph as follows —

"In the list, there are various items in respect of construction of drains — can you say how much these relate to broken drains and how much relate to other drains?"

PW10 replied saying —

"I cannot remember constructing any other drains. Other drains were constructed in 1964 and 1965."

Referring to expenses for grass cutting, she stated that it included cutting of grass at the broken drains and also other drains on Ampang Estate. She however agreed that the items dated 30th December, 1968 and 30th April, 1969 as to the construction of roads that they were included by mistake and she is not claiming these expenses and she could not say what road and drainage was referred to in item dated 11th November, 1969.

Amongst the claim for expenses incurred, the plaintiffs have listed certain items to show various sums paid for the maintenance of the estate roads, anti-malarial work and quit rents and assessments. Evidence has been adduced to show that the municipality would take over the maintenance of roads and drains after they are completed in accordance with the municipality's requirement. Mr. Chelamuthu (PW4) confirmed that it was the intention of the municipality to take over once the roads and drains are constructed to the municipality's requirements.

In the present case, I am satisfied that at the time of the slip, the drain at the southern boundary had already been constructed. However, no evidence was adduced to show when Lower Ampang Road was expected to be commenced. I am also unable to find any conclusive evidence to show that land for road reserve was in fact available for the construction of such road. The site plan (P12) merely indicates therein the proposed Lower Ampang Road but according to PW4, it is not a proper road but only an earth track. It is reserved for road purposes but not available.

I do not think it is disputed that the municipality would take over the maintenance of the drains and roads when all the roads and drains including Lower Ampang Road are completed. Before the plaintiffs can succeed in their claim under these heads, they must, I think, satisfy the court that had it not been for the subsidence, they would have completed the construction of all roads and drains at approximately a certain time. The court is of course aware of the fact that it is difficult if not impossible, for the plaintiffs to prove exactly when they expect to do this. That should not, however, relieve them from proving the approximate date on which they could hand over the maintenance of the roads and drains to the municipality. There is evidence to show that the development was then in progress but whether the plaintiffs could in fact construct Lower Ampang Road would depend again on the availability of land comprising the road reserve. On the evidence before me, I am not satisfied that the whole land comprising the road reserve was available before the slip. Mr. Kandiah Kumarasivam (PW7) a consulting engineer engaged by Ampang Estate to supervise the collapsed drain and earth filling adjoining the defendant mine, who gave evidence regarding the encroachment and the refilling, was apparently unable to say exactly how much of the land affected by the cave-in belonged to Ampang Estate and how much of it was road reserve. He also admitted that he had not heard of any survey being done. Now, in my opinion, it is for the plaintiffs to prove these matters to the satisfaction of the court. In the absence of such proof, I do not see how the court could allow the plaintiffs' claim for maintenance of roads and drains on the estate. The defendants to my mind, could not be made responsible for expenses incurred by the estate for such maintenance. The same I think applies to the claim for expenses incurred in carrying out anti-malarial work and the payment of quit rents and assessments. In the circumstances, I would only allow the expenses incurred for the construction and repair of drains resulting from the slip.

Mr. Edgar Joseph urged the court to consider only the expenses attributable to the first slip and he submitted that the claims for construction as opposed to repairs of drains do not appear in any way related to the land slip and that the plaintiffs would have had to construct drains for their building scheme in any event. Mr. Edgar Joseph further submitted that PW8 has not proved the various items claimed as special damages and he drew the court's attention that PW8 admitted that he was merely told by the plaintiffs that the expenses referred to in P18 were expenses incurred by Ampang Estate and that he had no personal knowledge as to whether the expenses mentioned in P18 were expenses incurred in respect of that estate. Mr. Edgar Joseph also contended that P18 is not admissible being purely hearsay as the authors of the vouchers were not called as witnesses.

In considering damages in this particular case, the court must not only consider the damages attributable to the first slip. As a result of the first slip, there had in fact been a continuous withdrawal of support of the plaintiffs' land, and since the damages were attributable directly to the continuity of that withdrawal of support, the defendants should, I think, be liable for damages which directly arose as a result of such

withdrawal. The expenses incurred for construction and repair of broken drains are I think such damages.

In the present case, I would therefore allow expenses for the construction, repair and clearing of drains and earthworks under item dated 27th February, 1967. I would disallow items dated 7th June, 1967 road blocks; 30th December, 1968 and 30th April, 1969 construction of road; item dated 11th November, 1969 road and drainage; item dated 26th December, 1969 road and item dated 30th June, 1970 grass cutting, levelling and road repairs.

I would also disallow expenses for cutting grass, anti-malarial charges, quit rents and assessments.

I therefore enter judgment for the plaintiffs in the sum of $47,928.65 and costs.

Judgment for the plaintiffs.

Solicitors: *Skrine & Co.; Joseph & Son.*

WONG LOK KHIAM v. DATO PETER LO SU YIN & ORS.

[O.C.J. (Seah J.) November 15, 1971]

[Kota Kinabalu — Notice of Motion No. 2 of 1971]

Practice and Procedure — Injunction — Interim injunction — Extension of period — Principle of preventing irreparable injury.

The burden of proving that an interim injunction should be continued until after the trial of the suit rests on the applicant throughout.

In this notice of motion the plaintiff in his supporting affidavits in an application for the extension of the interim injunction stressed two main points: (1) that pending the determination of the issue the matters should be kept in *status quo* and (2) that serious complications and irreparable damage would result if the said interim injunction should not be renewed.

Held, allowing the motion: (1) in exercising its jurisdiction by way of interlocutory injunction, the court acts upon the principle of preventing irreparable injury;

(2) the plaintiff had discharged the burden that irreparable damage would result if the interim injunction was not renewed. No injustice would be suffered by the defendants if the interim injunction was extended.

Cases referred to:-

(1) *Jones* v. *Pacaya Rubber & Produce Co. Ltd.* [1911] 1 K.B. 455 at p. 457.

(2) *Harman Pictures N.V.* v. *Osborne & Ors.* [1967] 2 All E.R. 324.

(3) *Donmar Productions Ltd.* v. *Burt & Anor.* [1967] 2 All E.R. 338 & 339.

NOTICE OF MOTION.

W. K. Loo for the applicant/plaintiff.

Nicholas Fung for the respondent/defendants.

Seah J.: On the 18th October, 1971 the Honourable the Chief Justice of the High Court in Borneo granted an interim injunction to restrain the abovenamed defendants by themselves their agents and servants or otherwise from acting in the capacity as the newly elected office bearers and for delegates of the Sabah Chinese Association and from taking control of the Headquarters of Sabah Chinese Association at No. 6, Beach Street, 1st Floor, Kota Kinabalu, and from taking possession of any documents, papers or files belonging to Sabah Chinese Association and to keep matters in *status quo* prior to the meeting convened by its President Dato Peter Lo Su Yin on the 16th October 1971 until the 15th November 1971, namely today, on the *ex parte* application of the plaintiff. I have now a notice of motion filed by the plaintiff praying for an order that the period of the said interim injunction granted on the 18th day of October, 1971 be extended until trial of the Civil Suit No. 340 of 1971. The plaintiff filed an affidavit in support of the extension. On or about the 12th November, 1971 the plaintiff swore a supplementary affidavit which is filed herein. It is settled law that the burden of proving that the said interim injunction should be continued until after the trial of Civil Suit No. 340 of 1971 rests on the plaintiff throughout.

In his supporting affidavits, the plaintiff stresses two main points, namely that pending the determination of the issue the matters should be kept in *status quo* and that serious complications and irreparable damage would result if the said interim injunction should not be renewed.

Buckley L.J. in *Jones* v. *Pacaya Rubber & Produce Co. Ltd.*(1) at page 457 said:

"The plaintiff now asks the court to grant an injunction until the trial to restrain the defendant company from forfeiting the shares. The question is, there being certainly a case to be tried, what is the proper order to make? In all cases of applications for interlocutory injunction the governing principle is that pending the settlement of the dispute between the parties the court will as far as possible keep matters in *status quo*."

In *Harman Pictures N.V.* v. *Osborne & Others*(2) Goff J. held that:

"in granting or withholding interlocutory relief the court would have regard to the balance of convenience but the governing consideration was the preservation of the *status quo*."

Ungoed-Thomas J. in *Donmar Productions Ltd.* v. *Burt & Anor.*(3) said:

"So in an application for the interlocutory injunction the application must establish a probability or a strong *prima facie* case that he is entitled to the right of whose violation he complains and, subject to this being established, the governing consideration is the maintenance of the *status quo* pending the trial.

It is well established that in deciding whether the matter shall be maintained in *status quo* regard must be had to the balance of convenience and to the extent to which any damage to the plaintiff can be cured by payment of damages rather than by the granting of an injunction."

In this motion, the plaintiff brings the suit not in his personal capacity but as secretary-general of the Sabah Chinese Association. In exercising its jurisdiction by way of interlocutory injunction, the court acts upon the principle of preventing irreparable injury. I am satisfied on the affidavits filed herein that the plaintiff has discharged the burden that irreparable damage would result if the interim injunction dated the 18th October, 1971 is not renewed accordingly. I have also considered on the one hand, the submission made by counsel for the defendant with regard to his clients'